

No Copyright in the Trite

A recent case from the First Circuit Court of Appeals reminds us that, although copyright law is broad and protective, it does have limits, including triteness: You can't copyright the wholly banal.

Johnson v. Gordon: The Facts

The case, *Johnson v. Gordon*, involved alleged misappropriation of copyrighted melodies and lyrics. The plaintiff had written a song, "You're the One (For Me)," a version of which (the "short version") he registered with the Copyright Office. The defendants, who may have been exposed to the plaintiff's work, had produced the song "You're the One," which became a hit performed by Sisters With Voices.

The first part of the case reminds us of the importance of registering copyrights in what you want to protect. The plaintiff claimed seven similarities between his song and the defendants' song; but four of these came only from his unregistered "long version." Although the court agreed that a copyright registration protects elements in an unregistered derivative version that are "borrowed" from the registered version, it concluded that "elements distinct to an unregistered work cannot draw protection from a registered work." Therefore, having failed to register the long version, the plaintiff couldn't base his infringement claim on similarities "contained exclusively in the unregistered long version."

The next part of the case includes a nearly note-by-note comparison of the three musical portions of the plaintiff's and defendants' works that the plaintiff's expert deemed similar. After describing the manipulations and contortions used by the expert to identify similarities, the appeals court, like the district court below, sees non-

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actionable relationships and coincidences, but no "meaningful degree of similarity."

The one undeniable similarity the court accepts is the use of the phrase "You're the One for Me" in the title and lyrics of each song. Unfortunately for the plaintiff, however, not only is the phrase similar, but in the court's eyes it is just too common. "[H]undreds of composers have registered songs capturing the same sentiment in the same verbiage. ... [T]his lyric is too trite to warrant copyright protection." Citing an earlier case, the Court reiterates that "clichéd language and expressions that convey ideas generally expressed in a limited number of stereotypical ways are outside the scope of copyright protection."

Johnson v. Gordon: The Lessons

Individuals and businesses often become enamored of their words and titles. But just as purely descriptive or generic terms are difficult or impossible to protect under trademark law, banal and commonplace phrases and expressions can be difficult or impossible to protect under copyright law. So, if you want the law to protect your words, melodies and other works of authorship from misappropriation —

- ✓ **Be original:** You'll get more attention and protection for novel and non-obvious writings and expressive works than you will for the commonplace and derivative.

- ✓ **Be protective:** The law lets you maximize protection for your original works by using copyright notices and registration; where appropriate, do so.
- ✓ **Be current:** Not only should you register copyrights in the first published versions of your important works, but if you make significant changes (for example, a materially revised version of your song, software or documentation), consider filing for copyright in these derivative versions, too.
- ✓ **Think before you sue:** Don't get so enamored of your titles, content or whatever that you assume any use of similar words by others is a suit-worthy injury; save your litigation dollars for important claims that have a chance of succeeding.

The Morse, Barnes-Brown & Pendleton, PC, Technology Licensing & Intellectual Property Practice counsels businesses of all sizes on creating, protecting and transferring IP assets, including advice on trademark, copyright, advertising, Internet and technology law.

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